No. 14652

United States Court of Appeals
For the Ninth Circuit

LIBBY, MCNEILL & LIBBY (a corporation) and YAKUTAT & SOUTHERN RAILWAY (a corporation),
Appellants,

vs.

CITY OF YAKUTAT, ALASKA (a municipal corporation),
Appellee.

APPEAL FROM THE DISTRICT COURT FOR THE DISTRICT OF ALASKA, DIVISION NUMBER ONE

BRIEF OF APPELLEE

WILLIAM L. PAUL, JR.
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APPEAL FROM THE DISTRICT COURT FOR THE DISTRICT OF ALASKA, DIVISION NUMBER ONE

BRIEF OF APPELLEE

PLEADINGS

This case has been before this Court before as No. 13,455. On July 8, 1953, this Court rendered its Opinion ending: "The order of sale is reversed." The basis of the Opinion is that the trial court is without jurisdiction to give final judgment against real property for what may be personal property taxes. The former appeal is reported at 206 F.(2d) 612. The memorandum opinion of June 25, 1954, of the trial court on the new trial is unreported.

On May 6, 1954, appellee objected in the trial court (Tr. 340) to the form of the judgment proposed by appellants on the mandate. The proposed form related solely to costs taxed by this Court on the prior appeal. The ground of the objection was that these costs should run against the remaining liability of appellants. It appeared then that the appellee had clarified the appli-

cation of the money paid by appellants on December 18, 1949, which had been applied generally to reduce the personal and real property tax indebtedness of appellants. This clarification was simply that the $1,222 personal property tax indebtedness had all along been extinguished, and the balance of the $1,751.75 paid ran against the real property tax indebtedness for which there would then be a balance due of over $2,400—thus leaving an amount more than sufficient to absorb the costs taxed on the prior appeal.

On May 10, 1954, appellee moved (Tr. 340) that this case be set down for trial and the trial court granted the motion, setting the trial for June 24, 1954.

On May 10, 1954, the appellee moved (Tr. 341) to strike all the evidence of appellant relating to valuation of property introduced on the former trial, on the ground that the appellants had not exhausted their administrative remedy before the appellee's Board of Equalization, the parties assuming that the appellants had the pleadings upon which to introduce such evidence and would offer to introduce the same evidence on the re-trial as had been introduced on the former trial.

On May 12 (*nunc pro tunc* May 8), 1954, the trial court denied (Tr. 342) appellee's objections to the proposed form of judgment on the mandate on the ground that the appellee's remaining claim for real property taxes against appellant's real property was contingent. The judgment was signed (Tr. 339).

On May 24, 1954, after notice, appellee took the deposition (Tr. 345-350) of the appellee's city clerk to iden-

tify the segregation between personalty and realty appearing in the original assessment roll. And noticed the filing thereof on May 25, 1954.

On June 23, 1954, pursuant to leave of court (Tr. 383-383), appellee filed its amended supplemental delinquent tax roll for 1949 (Tr. 369). This shows a claim for balance due of real property taxes, penalty and interest against real property owned by appellant.

On June 24, 1954, the case went to trial (Tr. 437 *et seq.*) upon the amended application, appellant's original and subsequent objections thereto preserved or renewed. The parties offered all the evidence respectively adduced by them at any time; and appellee offered the deposition of its city clerk, and the trial court received it in evidence.

On the trial the court made its memorandum decision on June 25, 1954 (Tr. 382) in favor of appellee, including granting the motion to strike all of appellant's evidence of valuation of its realty.

On June 29, 1954, the trial court made a new order of sale relating to real property taxes, penalty, interest and costs due against real property of appellant, from which this appeal is taken (Tr. 388).

The order of sale allows a credit of $719.94 for costs taxed by this Court on the former appeal.

Appellant objected to everything on numerous grounds, repeating some objections as many as ten times. All objections were overruled by the trial court. These are not set forth here because within the doctrine of the law of the case or so patently within the trial court's discretion as not to be worthy of mention.

STATEMENT OF THE CASE

No statement of facts is made on this second appeal for the period prior to May 6, 1954.

On May 6, 1954, by commitment in open court, appellant clarified the application of the money theretofore paid by appellant from a partial payment of aggregate of personal and real property taxes (Pr. 143) to a payment first on the personal property taxes in full, and the balance of the money to reduce the real property taxes, penalty and interest to the amount here in controversy, as shown by the amended supplemental delinquent tax roll filed June 23, 1954 (Tr. 369).

Issue was joined by appellant renewing all defenses. This does not clearly appear insofar as the original objections (Tr. 15-28) are concerned, but the entire context of the record assumes that appellant's original objections were preserved to it and sufficient to it as against the amended application.

At the trial on June 24, 1954, appellee introduced in evidence the deposition (Tr. 347) of the city clerk identifying a photostatic copy of the original combined assessment-tax-delinquency tax roll for 1949 (Tr. 405) as well as the entire previous record except portions relating to property valuation subject to the motion to strike. The assessment roll identified shows a segregation between realty and personalty in the amounts upon which the computation was made of taxes, penalty, interest and costs due on appellant's real property in the order of sale of June 29, 1954.

At the same time, all the evidence adduced by the appellants on the previous trial (Tr. 243-311, 113-143)

was offered by appellants and was received (Tr. 450 *et seq.*) subject to a ruling on appelle's motion to strike (Tr. 448).

The entire participation of the appellants before the City's Board of Equalization consisted of a naked claim on December 7, 1949, of excessive valuation (Tr. 143). Appellants made no claim that the real property values were fraudulently fixed.

The appellants' evidence of valuation was stricken by the trial court on June 25, 1954, in its memorandum opinion (Tr. 383) "because not presented to the Board of Equalization." While the motion to strike had also sought to exclude the evidence previously adduced by appellants in the form of the December 7, 1949, letter (Tr. 143) relating to appellants' contention of compromise, the trial court did not act on such portion of the motion because it had already been disposed of adversely to the appellants on the prior opinion (98 Fed. Supp. 1011).

The June 29, 1954, order of sale in effect refuses to disturb the valuation fixed on December 10, 1949, by the Board of Equalization. These are (Tr. 347) "Land $11,000, Improvements $176,625." The millage rate of 13 mills is shown, as well as the total amount of tax due. From this information it is merely computation to figure the tax due from each classification.

Because the personal property valuation is fixed at $94,000 (making a tax of $1,222), the payment received by the City and applied on December 18, 1949, of $1,751.75 pays the personal property tax in full, and leaves $529.75 toward payment of the real property

tax of $2,439.13 plus penalty of 10% on the balance, plus interest at 1% monthly on the principal balance. This is essentially the same application of appellants' payment as was originally made.

On December 7, 1949 (Tr. 143-144), the appellants directed (by defendants' attorney, R. E. Robertson) the application of the payment of the $1,751.75 to payment of taxes levied upon real and personal property.

The order of sale from which this appeal is taken is for the balance due of real property taxes plus penalty and interest on the basis of the foregoing computation, and costs.

QUESTIONS PRESENTED

1. Because on the former appeal this Court simply "reversed" the former order of sale, the appellee was entitled to a new trial on the amended application.

2. The trial court held a new trial.

3. The Doctrine of the Law of the Case is applicable and enabled appellee to present the testimony of the city clerk at the new trial, giving the evidence of segregation of realty and personalty that the Court of Appeals was unable to find after searching the entire record on the former appeal.

4. The trial court's striking of appellants' evidence of valuation because appellants had not exhausted their administrative remedy before the Board of Equalization was proper.

5. The trial court had previously ruled that appellants' evidence of valuation did not sustain an issue of bad faith.

6. Allowance of costs is discretionary with the trial court, the trial court has exercised its discretion, there is no claim that there has been an abuse of discretion.

These questions as here presented we think rephrase the more important aspects of appellants' case on appeal—they are not phrased in counsel's manner or order. The present statement is made for what we believe the sake of clarity and logical order.

ARGUMENT

1. Because in No. 13455 this Court simply "Reversed" the Former Order of Sale, the Appellee Was Entitled to a New Trial on the Amended Application.

This appears to be largely appellant's fifth proposition.

We have characterized this as a proceeding on an amended application. Apparently this is the same thing that the trial court had in mind for the purposes of the second trial on June 24, 1954, because the trial went ahead over appellant's objection that appellee had not filed a "new duplicate delinquent tax roll" as stated in the order of June 12, 1954 (Tr. 365).

The original application (Tr. 1) had attached to it a sort of exhibit consisting of the main delinquent tax roll (of all property except appellants') with a notice that the roll would be presented to the District Court for order of sale. Later a supplemental exhibit was added (Tr. 9), consisting of excerpts from the tax books of appellee and a similar notice.

The original application was not itself amended as a document except in the sense that one of its exhibits

was amended on June 23, 1954, by appellee furnishing the court complete excerpts from the original delinquent tax roll in a document entitled "Amended Supplemental Delinquent Tax Roll."

This is desirable from the viewpoint of giving the court clear papers, perhaps they could have been even clearer by appellee filing a completed document of amended application. But the trial court got along with what it had, and there was no claim from appellants of confusion. Appellee took the view (Tr. 440 *et seq.*) that it was accommodating the trial court in this filing of the amended exhibit and complying with the trial court's order, but that in view of the Opinion of this Court the amendment to segregate property could be made at any time by any means before the trial closed.

At the trial of June 24, 1954, ordered then to be held by the trial court on May 10, the parties produced all the evidence and issues of law and fact they wanted to produce. This included all the evidence adduced at the two previous trials (Tr. 442, *et seq.*), the deposition of the city clerk identifying the photostatic copy of the original combined assessment-tax-delinquency roll (Tr. 347), and the admissions of counsel (Tr. 379).

It is our position that an unqualified reversal automatically permits a new trial. A specific direction to have a new trial is unnecessary.

Our examination of decisional authorities indicates that the editors of American Jurisprudence state the rule quite well. At Vol. 3, Appeal & Error, Sec. 1240, they say:

"As a general rule, an unqualified reversal en-

titles the appellant as a matter of right to a new trial, entirely unembarrassed by anything which occurred at the former trial * * *

"Generally when a case is reversed and remanded for further proceedings, it goes back to the trial court and there stands on the issues as if the former trial had not taken place. In the absence of any direction limiting the new trial to particular issues, the whole case is tried anew, in pursuance of the principles of law declared in the opinion of the appellate court, which must be regarded as the law of the case on the second trial * * *

"While the effect of the reversal of a judgment is to vacate or set it aside, it does not include any other affirmative action, unless specially directed by the reviewing court. Hence, the reversal of a judgment in favor of a party and the remanding of the cause generally do not warrant the entry of a judgment against him and in favor of his adversary * * *

"Sec. 1241. AMENDMENT OF PLEADINGS AFTER REMAND. If a cause is remanded without specific directions, or with general directions for a new trial either upon an affirmance or reversal, the lower court has, as a general rule, the power to permit amendments and the parties are free to make such proper amendments to the pleadings as the trial court in its discretion may allow."

This rule has been with us quite a while. For instance it is stated at 98 Am. St. Rep. 128 on the question of "Effect of the reversal":

Upon the reversal of a judgment without qualification on the part of the reversing court, it must, for most purposes, be treated as no longer in existence. * * * The appellant is restored to the posi-

> tion in which he was before the judgment was pronounced against him (Citations). To reach this end it is not necessary that any further order or proceeding be taken in the trial court (Citations).

To support the rule, the editors cite the following cases:

In *Landis v. Interurban Ry. Co.*, 173 Iowa 466, 154 N.W. 607 (1915), the court on the former appeal had rendered an opinion ending "For the reasons pointed out the judgment must be and it is reversed." This we submit is exactly similar to the instant case. The Iowa Supreme Court held:

> "These cases (citing from Iowa, RCL, Colorado, Ohio and Illinois) generally hold that, where a law case is reversed on appeal and remanded to the lower court for further proceedings, the case goes back to the trial court and stands on the issues as if the former trial had not taken place."

A similar situation existed in *De Palma v. Weinman,* 15 N.M. 68, 103 Pac. 782 (1909), where on the first appeal the court had rendered an opinion ending "Remanded to that court for further proceedings in accordance with the opinion."

An analogous situation appears in *Stehlau v. John Schroeder Lumber Co.,* 152 Wisc. 589, 142 N.W. 120 (1913), where the former appeal had gone of on a judgment of non-suit. The court had to determine whether the new trial was indeed "new" in facts, or whether it was merely a new argument on the same old facts.

We are, of course, all familiar with the old demurrer situation, now characterized as a motion to dismiss.

Against a contention of *res judicata,* the court in *Case v. Hoffman,* 100 Wisc. 314, 72 N.W. 390 (1897), held:

> "Where the Supreme Court determines a demurrer to a complaint, any judgment based on facts assumed to exist in the opinion, but which are not alleged in the complaint, is not *res judicata.* The reasons set forth in the opinion of the Supreme Court are not *res judicata,* the judgment makes only that which was in issue decided *res judicata.*"

The extremes to which appellant's contention of *res judicata* or the law of the case can be carried are illustrated in *Barber v. Hartford Life Insurance Co.,* 279 Mo. 316, 214 S.W. 207, 12 A.L.R. 758 (1919). This case had been before the U. S. Supreme Court at 245 U. S. 146 where the judgment was reversed. The mandate contained, as here, the usual words:

> "Such execution and further proceedings may be had in said cause, in conformity with the judgment and decree of this court above stated as, according to right and justice, and the Constitution and Laws of the United States, ought to be had therein, the said writ or error notwithstanding."

The case found its way back to the trial court, a new trial was had and was again before the Missouri Supreme Court for a holding:

> "Our judgment remanding the cause to the Johnson Circuit Court for retrial was in full accord with the mandate of the Supreme Court of the United States, and gave the trial court full jurisdiction, not only to retry the issues of fact presented by the pleadings in the first trial in accordance with the principles announced in the judgment and opinion of the Supreme Court of the United States, but also to reframe those issues as provided by our

code. A retrial does not mean a mere replica of the former trial, but is a trial, as the term implies, in the light of experience and knowledge which may have been acquired in the interval."

The case was affirmed by the Supreme Court in 1921 at 255 U.S. 129.

Indeed the rule as stated by the editors of American Jurisprudence is so well stated that the 5th Circuit quotes and relies upon it at *Roth v. Hyer,* 142 F.(2d) 227 (1944), where on the former appeal (133 F.(2d) 5) the cause had been "reversed for further and not inconsistent proceedings." *Certiorari* was denied by the Supreme Court at 323 U.S. 712 (1944).

In *Pyramid National Van Lines v. Goetze,* decided by the Municipal Court of Appeals for the District Court of Columbia, 66 A.(2d) 693 (1949), the former appeal had ended with an opinion "Reversed" (65 A.(2d) 595). The mandate contained the usual words of remand. After a new trial and on a second appeal the court held:

"When the mandate of an appellate court is filed in the lower court, that court reacquires the jurisdiction which it lost by the taking of the appeal. *United States v. Howe,* 2nd Cir., 280 Fed. 815, *cert. den.* 259 U.S. 585; *Pope v. Shannon Bros.,* 195 Ark. 770, 114 S.W.(2d) 1; 3 Am. Jur. Appeal & Error, Sec. 1229. The remand for further proceedings is always made when the record does not enable the reviewing court to determine the rights of the parties. 3 Am. Jur. Appeal & Error, Sec. 1210. Where a judgment previously reversed without further order, the mandate to that effect does not preclude any other affirmative action unless specifically directed by the appellate court. 3 Am. Jur. Appeal &

> Error, Sec. 1184. Thus in cases of reversal and remand for further proceedings, the general rule is that the lower court is free to make any order or direction in further progress of the case not inconsistent with the appellate decision as to any question not presented or decided by such decision. 3 Am. Jur. Appeal & Error, Sec. 1233."

Our views are supported by *Rogers v. Hill,* 289 U.S. 582 (1933) where the words were used:

> "Moreover if the (U. S. Circuit) court intended to direct dismissal (on the former appeal), it is to be presumed that it would have done so unequivocally and directly by means of language, form of decree and mandate generally employed for that purpose."

The question may arise in several different ways, such as where a successful appellant on the first appeal seeks too broad a judgment on the mandate, objections to amendments to the pleadings on the new trial, hearing on a writ of mandamus in the appellate court on the meaning of its mandate, etc. And the rule is uniform. See *Wells Fargo & Co. v. Taylor,* 254 U.S. 175 (1920); *Re Sanford Fork and Tool Co.,* 160 U.S. 247 (1895); *Les v. Alibozek,* 269 Mass. 153, 168 N.E. 919, 66 A.L.R. 1094 (1929); *Weber v. E. J. Larimer Hardware Co.,* 234 Iowa 1381, 15 N.W.(2d) 286 (1944) (citing 3 Am. Jur. Appeal & Error, Sec. 1241, and 5 C.J.S., Appeal and Error, p. 1522, Sec. 1969 (b).

The only limitation on the trial court is that it shall exercise its sound discretion to permit amendment of the pleadings within the frame work of the appellate opinion.

In the demurrer or motion to dismiss situation, this

means that the defendant, after the appellate court's reversal of a judgment of dismissal, should be permitted his defense. See *Chase v. United States,* 256 U.S. 1 (1920). And this includes abandoning the earlier defense altogether and substituting an entirely new defense, if such switch is advisable to the trial court, citing *Messenger v. Anderson,* 225 U.S. 436.

The language of the U. S. Supreme Court in *Wells Fargo & Co. v. Taylor,* 254 U.S. 175 (1920) is particularly instructive:

> "It is urged that the decision of the circuit court of appeals on the first appeal was final, in that it disposed of all questions in the suit and left nothing open to the district court but to dismiss the bill. * * * It (the court of appeal's first decision) turned on the suffiicency of the bill, and on that alone. The district court had held the bill sufficient when challenged by a demurrer. The circuit court held it insufficient and for that reason reversed the decree and remanded the suit. Had the district court taken that view when acting on this demurrer, it undoubtedly could, and probably would, have allowed an amendment curing that defect. Could it not equally allow the amendment after the circuit court of appeals pointed out the defect and remanded the suit? It, of course, was bound to give effect to the decision and mandate of the circuit court of appeals; but that court did not order the bill dismissed, or give any direction even impliedly making against the amendment * * * we think * * * that the district court was left free, in the exercise of its discretion, to permit the amendment."

Indeed, the amendment power of our courts is so broad, that we suggest that this court on the former

appeal searched the record for facts that would permit an amendment—did the entire record contain sufficient facts to enable elimination of personal property. If such facts had been found anywhere in the record, the amendment would have automatically been allowed on the former appeal. Naturally this makes for ultimate justice and avoids litigation. The highest court of Massachusetts followed a similar procedure in *Les v. Alibozek,* 269 Mass. 153, 168 N.E. 919, 66 A.L.R. 1094 (1929).

While there was no finding in the *Les* case, *supra,* that the trial court had abused its discretion in refusing to allow the amendment, appellate courts are sometimes given to hinting rather broadly that the amendment should have been allowed. For instance, in *Weber v. E. J. Larimer Hardware Co.,* 234 Iowa 1381, 15 N.W.(2d) 286 (1944), a personal injury action, the plaintiff had overlooked alleging future loss of earnings and offered to amend during the course of trial, which offer was denied. Plaintiff appealed stating this refusal as one ground. The appellate court held that it would not rule on this ground of appeal because it was remanding the case on other grounds and

> "the court might well have permitted plaintiff to amend. We have repeatedly held that to allow an amendment, especially one like this, is the rule and to deny it is the exception. * * * This is the rule, generally. 3 Am. Jur. 737, Sec. 1241; 5 C.J.S., Appeal and Error, p. 1522, Sec. 1969(b)."

See also for a similar situation *Piechota v. Rapp,* 148 Neb. 443, 27 N.W.(2d) 682 (1947), where same editorial citations given.

On the other hand, of course, the trial court in exercising its sound discretion to allow amendments on the retrial, should not go so far as to deprive the defendant of a trial on the amendment. For instance, in *Kern v. Kelner,* 75 N.D. 703, 32 N.W.(2d) 169 (1948), the case had come back from the appellate court, plaintiff moved for leave to file a supplemental complaint, defendant moved to dismiss on the mandate. The trial court granted leave to file the supplemental complaint, denied the motion to dismiss, and pre-emptorily granted judgment for plaintiff. On the second appeal it was held:

> "When a cause is remanded generally to the lower court for further proceedings and where there are no directions to the contrary, the lower court has authority where the nature of the case makes that necessary or proper to grant permission to amend the pleadings or to file supplemental pleadings. 3 Am. Jur., pp. 737, 739, Sec. 1241; 5 C.J.S., Appeal and Error, Sec. 1969, p. 1522; *Rogers v. Hill,* 289 U.S. 582, 587; 324 U.S. 154; *Davis v. Stewart,* 67 Cal. App.(2d) 415, 154 P.(2d) 447, 449."

There thus appeared no opportunity for defendant to answer the supplemental complaint—this was carrying the effect of the mandate too far.

We are not confronted with that situation here, for all parties and the trial court regarded appellant's answer to the original application as running against the amended application. Plus such further objections as appellant wanted to make.

We suggest that what appellant has been trying to do is to try to take advantage of the statute of limitations. They want not to be confronted with an amended complaint which would have preserved the case. They

wanted the city clerk to make up a new delinquent tax roll, with notice of presentation to court, post it for thirty days, and file it with a new application in the District Court—as a new case commenced almost five years after delinquency arose on December 15, 1949. Objectors would then have raised an affirmative defense as provided Section 55-2-7 A.C.L.A. 1949:

> "WITHIN TWO YEARS—Third. An action upon a liability created by statute * * * ."

On the other hand, the appellee wanted to do just what this court did—supply from some part of the entire record, any part at all, evidence of segregation.

At page 5 of the Opinion (206 F.(2d) 612, 616), this court said:

> " * * * If the realty and personalty of appellants were ever separately assessed, as the statute requires, that fact does not appear in the record. Since there is nothing in the record to indicate * * * , if properly assessed, that any specific amount of taxes thereon is unpaid, the city has made no case against appellants * * * "

We can only deduce from this Court's Opinion, that if this Court had been able to find in the former record what we have now supplied in this record literally, the July 8, 1953, Opinion would have been an affirmance of the order of sale. The segregation does not have to appear in the duplicate delinquent tax roll, or its supplement, or its amended supplement—if the segregation can be found from any evidence in the entire record, the proceeding stands. On this point, the trial court and appellee did in effect only what this court told us to do.

As a matter of actual practice in Alaska, and we think

in most cities, there is no such thing as a separate document to be called a "delinquent tax roll." Rather, there is one or a series of books containing all property and tax information and action, too bulky to be posted or presented to court. For Yakutat, typically, the excerpt identified on deposition (Tr. 347), shows property description and classifications, name of owner, tax year, assessment valuations, mileage rate, taxes, and balance of taxes due or delinquency. Alaska practice since the Organic Act of 1913 has been to extract information from this combined assessment-tax-delinquent tax book, and present such excerpts with an application to the District Court after notice for judgment of order of sale.

The application is believed necessary because the "delinquent tax roll" in itself does not ask the court to do anything. There is no objection here that the application in itself is not fully sufficient.

The application is in essence a complaint. The complaint has been amended, not by substituting a new cause of action, but by separating a surplusage relating to personal property out of the complaint, and leaving that portion relating to real property.

This is in the nature of a simple motion to amend the complaint to conform to the facts proved, and can be made at any time before the case is finally disposed of.

No doubt the readiness this court had to find evidence justifying the possible amendment is further founded in our statute Sec. 16-1-124 A.C.L.A. 1949:

> " * * * and no objection to the valuation of the property, the manner of the assessment and levy

of the tax, or any of the subsequent proceedings shall be entertained by the court which does not effect the substantial rights of the party interposing the objection * * * ''

2. The Trial Court Held a New Trial.

We hope counsel is not drifting over into an idea that appellants had no answer or retrial below at all. This new view and ''contention'' turns around our use of the words ''partial new trial,'' and are quoted from Tr. 439-440 by counsel as follows:

> ''The Court: Well, your position now is that these steps, that are set forth in the statute that must be taken with reference to the preparation and the presentation of the delinquent tax roll, need not be taken in the case of an amended tax roll? That is the thing I am in doubt about.
>
> Mr. Paul: Yes, I think so, Your Honor.''

And counsel pursues the idea at page 15 of his brief:

> ''The pretended Amended Supplemental Delinquent Tax Roll for 1949, and it was not served until June 23, 1954, too late for Appellants to obtain any new evidence.''

And again:

> ''could not foresee the necessity of obtaining any further evidence for the hearing of June 24, 1954.''

Because the latter quotation appears in a sentence 190 words long (not counting parenthetical material referring to the record), we might be mistaken, but the quoted material to us does not make sense in the context of the record.

It is of course unfortunate that we used the words ''partial new trial.'' We point out that the phrase was

used only in a descriptive sense of a small stage of the proceedings—certainly not in a sense to define the entire proceeding. Everyone understood that all objections and evidence counsel ever had had or had renewed and made for the first time ran against the city's case on the new trial. This was particularly thrown up to counsel by the trial court at Tr. 455-456:

> "THE COURT: Well, then, as I understand it, the evidence you want to introduce in support of these latest objections is evidence that had not been previously introduced; is that it? If it has been previously introduced—
>
> MR. ROBERTSON: I haven't had an opportunity to put in any evidence on that, Your Honor.
>
> THE COURT: But my question is whether, if all you want to do is duplicate what has been done before, I don't know why the court couldn't consider it as evidence in this case.
>
> MR. PAUL: As to that, Your Honor, the evidence was introduced, Your Honor. All evidence introduced in the previous case, except that relating to valuation, to which I filed a motion to strike, I regard as part of this case.
>
> THE COURT: Well, let the record show then that the evidence hereinbefore introduced in support of objections such as are made on this particular proceedings upon the so-called supplemental or amended tax roll may be considered in support of objections presently made. That will serve your purpose, will it not?
>
> MR. ROBERTSON: Yes. But I can't agree with the motion to strike the valuation * * * "

In other words, Mr. Robertson for appellants in effect

offered all the evidence of the previous trial at this trial insofar as proving in full any defense he had to make now. If he had wanted literally a trial *de novo,* without the generous stipulations of any sort by appellee, he would have taken all his depositions from Chicago all over again to say the same thing.

Again at Tr. 417 on the question of preservation of testimony of the city clerk (at that moment in Juneau personally), the appellee stated in the stipulation that all objections and evidence were preserved:

> "THE COURT: Well, the court is going to leave here before the next motion day. As I understand it, the question is whether we can start with the assessment roll or will have to go beyond that. What about that?
>
> MR. PAUL: Go beyond the assessment roll?
>
> THE COURT: Yes; and start it some place before that.
>
> MR. PAUL: I don't think so, Your Honor. We have taken very extensive testimony already, and that is part of the record * * * "

What counsel had in mind and in effect so stated (Tr. 456) was not that he was being deprived of opportunity to answer the amended application and a trial upon such answer—because he had all that already. What counsel feared related only to the competency of his evidence of valuation, for he continued (Tr. 456):

> "I can't come in here myself and prove that."

Of course, he would not because he would be an incompetent witness. But appellee's motion to strike appellant's evidence of valuation, which evidence could only have been adduced on the original objections running

against the amended application, was not based on a ground of competency—as a matter of fact it was entirely competent evidence as far as it went. Rather, the motion to strike was based on a ground of relevancy and materiality—a purely legal isue.

And so we finally agreed (Tr. 458) that counsel was offering all the evidence adduced on the first trial as fully stating his position on valuation.

We admit that the pleadings could have been set up in nicer and neater order. But the realities of the situation are that all issues of fact and law are stated in writing or in open court at one time or another and the parties adduced all the evidence they desired, reaching the focal point of the trial of June 24, 1954.

3. The Doctrine of the Law of the Case Is Applicable and Enabled Appellee to Present the Testimony of the City Clerk on June 24, 1954 Providing the Evidence of Segregation of Realty and Personalty that this Court Could Not Find after Searching the Entire Record on the Previous Appeal.

This point was argued below at Tr. 445 *et seq.* It appeared that there was evidence of segregation for the 1948 tax proceedings, but these were never before this Court.

For the 1949 tax proceedings involved in these appeals, this Court searched the entire record and was unable to find such segregation. See Argument on Rehearing denied, Aug. 31, 1953.

Accordingly, no useful purpose could be served by remanding the case with specific directions on what order of sale to enter or not enter; for there were no

facts in the record to enable segregation, or to show that there had ever been segregation, or that anything remained unpaid on the realty if there had been segregation.

In every situation, it is a problem to determine what issues of law and fact are encompassed in an application of the Doctrine of the Law of the Case. We assume that all such issues decided expressly or by necessary implication are affected by the Doctrine.

Those issues of law and fact which have been decided by necessary implication of a decision are those we must assume as having been disposed of upon the application of the Doctrine of Judicial Reticence—that a court will not decide issues unnecessary to dispose of the case.

The July 8, 1953, Opinion decided the former appeal at a point very late in the proceeding. At least chronologically then, we must assume that this court before examined and decided adversely to appellant all their objections here raised as their Second Proposition (Brief, p. 18, Tr. 15-28, resummarized as 43 objections at Tr. 42-49). Some portion of their First Propostion is intermingled (Brief, p. 14).

Thus the first chronological step is the placing of property on the assessment roll. This was done by the Board of Equalization simply by copying the work of the previous year of the assessor. Necessarily this court held this informality as one not affecting the substantial rights of appellants.

Indeed, this court said: "Ordinarily the errors noted would not require reversal of the order in *toto,*" and

then goes on to consider the inability of this court to find a segregation of realty and personalty.

It is true that this court posed what first appears to be a hypothetical situation of assuming all the other errors to be overruled when it used the words: "If we should examine the other questions raised by appellants and resolve them in appellee's favor," etc. But we submit that this is merely a manner of speaking and does not pose a hypothetical situation at all—it is merely manner of speaking to pose the ultimate question. We submit that the entire paragraph should be regarded as a unit requiring the application of the Doctrine of the Law of the Case upon every step in the tax procedure up to the instant of the signature of the first order of sale. And in effect this is exactly what this court did—it regarded the application and delinquent tax roll as amendable from *any* of the evidence adduced by the parties in the entire record. And the only item needing amending was the segregation of realty from personalty. If the trial court had been able to do this at the last instant of taking evidence before the signature of the first order of sale, we must assume that the trial court would have been justified in doing what this court tried to do—allowed the amendment and made an order of sale for real property taxes against real property.

As the deposition of the city clerk shows (Tr. 345), the realty was separately assessed originally. The defect occurred in the first trial and appeal when the copy of the assessment-tax-delinquent tax record was presented to the trial court—this copy neglected the segregation.

Appellants objected to the taking of this deposition, the objections were overruled in plenty of time for appellants to propound cross-interrogatories. Appellants propounded no cross-interrogatories.

This evidence enabled the trial court to enter a judgment in the form of an order of sale for a balance due on real property taxes due on real property.

Having in mind, it is our position that all the other technical objections cannot now be reconsidered, because the Doctrine of the Law of the Case is applicable.

This Doctrine is adequately stated at 5 C.J.S., Appeal and Error, p.. 1267, Sec. 1821:

> "As a rule of general application, where the evidence of a second * * * appeal is substantially the same as that on the first * * * appeal, all matters, questions, points or issues adjudicated on the prior appeal are the law of the case on all subsequent appeals and will not be reconsidered or readjudicated therein."

In a demurrer situation, this court applied the rule by holding in *Freeman v. Smith,* 62 F.(2d) 291 (1932) that the answer filed in the trial court raised immaterial issues.

In what we believe to be a somewhat analogous situation, this court applied the rule in *City of Seattle v. Puget Sound Power & Light Co.,* 15 F.(2d) 794 (1926), *cert. den.* 273 U.S. 752.

The decision on the first appeal herein may be characterized as one of lack of knowledge on the issue of segregation; hence the doctrine does not apply to appellee in making the amendment to the application and supplying the additional evidence.

In re Baird's Estate, 223 Pac. 974 (Calif., 1924);

Madsen v. Le Clair, 13 P.(2d) 939 (Calif., 1932);

Aldering v. Allison, 83 N.E. 1006 (Ind. 1908);

International Fuel, Etc. v. Donner Steel Co., 223 N.Y.S. 110 (1927);

Royal Ins. Co. v. Caledonian Ins. Co., 187 Pac. 748 (Calif., 1920).

For this reason, we do not answer most of appellant's points, for they have already been decided adversely to them on the former appeal.

4. The Trial Court's Striking of Appellants' Evidence of Valuation Because Appellants Had Not Exhausted Their Administrative Remedy Before the Board of Equalization Was Proper.

Appellee's motion to strike all of appellants' evidence of valuation was made for the first time on the second trial. The motion was made in writing on May 10, 1954 (Tr. 341), which is in plenty of time for appellants' to have countered it with more evidence. However, the motion was heard on the evidence already offered.

The only showing appellants could make of exhausting their administrative remedy was an appearance by letter before the Board of Equalization on December 10, 1949 (Tr. 143-144). This makes the naked claim:

> "On behalf of each of them (appellants herein) I hereby protest the assessment and taxation of their properties at any higher valuations than shown in these returns so heretofore sent you * * *

> they show a total valuation (of realty and personalty) of $137,500 * * * (Appellants) make tax returns upon * * * correct and proper valuations * * * "

At this time appellee had in force an ordinace requiring application to be made either in person or in writing for a reduction of assessment, to enable the Board of Equalization to examine the property owner thereon. Sec. 7 (Tr. 90) of the ordinance requires that the application state the facts upon which the application is based.

It is our position that appellants made no application, or that if the December 7, 1949, letter is an application then it stated no facts but merely a claim. In either case the letter could properly be disregarded. Properly so, this made no impression on the Board of Equalization (Tr. 231).

The rule is stated at 84 C.J.S. Taxation, p. 1076, Sec. 553:

> "Generally, questions not raised and properly preserved for review before the reviewing board or officers will not be considered on a review of the decision of the board on appeal."

This expression of the rule, so widely applied in the field of administrative law, is confirmed by the following decisional authorities: *Commercial Merchants National Bank & Trust Co. v. Board of Review of Sioux City,* 229 Iowa 1081, 296 N.W. 203; *Commissioner of Corporations and Taxation v. Boston Edison Co.,* 310 Mass. 674, 39 N.E.(2d) 584 (1942); *Archer-Daniele-Midland Co. v. Board of Equalization of Douglas County,* 154 Neb. 632, 48 N.W.(2d) 756 (1951); and *Swet-*

land Co. v. Evatt, 139 Ohio St. 36, 37 N.E.(2d) 601 (1941).

Appellee has provided for a hearing in a way typical in Alaska, and perhaps typical all over the United States, and the entire procedure of due process is thus satisfied. *Hodge v. Muscatine County,* 196 U.S. 276; *Henry v. Manzella,* 356 Mo. 305, 201 S.W.(2d) 457 (1947); *People v. Skinner,* 18 Cal.(2d) 349, 115 P.(2d) 488 (1941). If the appellants think fit to commence to participate in this procedure (thus confessing they have adequate notice) but rely solely upon their technical objections in the face of our statute (Sec. 16-1-124), they have waived their hearing on the merits and should now not be considered to be asking our courts to usurp the functions of the Board of Equalization. Mere overvaluation is insufficient to overthrow an order, otherwise our courts would be converted into assessing boards. *Johnson v. Johnson,* 92 Mont. 512, 15 P.2d 842, 845 (1932).

Certainly no issue was raised to the Board of fraud, illegality, malicious or arbitrary use of powers. It is certainly not the same to say that a valuation is excessive. *Stone v. City of Dallas,* 244 S.W.2d 937 (1951). Nor is marked inequality. *Rancho Santa Margareta v. San Diego County,* 135 Cal. App. 134, 36 P.2d 716 (1933), at p. 725.

5. The Trial Court Had Previously Ruled that Appellants' Evidence of Valuation Did Not Sustain an Issue of Bad Faith.

The first time we see anything even approaching fraud, illegality, malicious or arbitrary use of the pow-

ers of the Board of Equalization (84 C. J. S. Taxation, p. 1051) are in the original objections of appellants filed January 8, 1952 (Tr. 21-22). There first appears a charge of "bad faith" in the appellee fixing the assessment value and not equalizing. This charge is coupled with one that the value was fixed by Felix Toner, whom we all knew to be a highly competent engineer and well qualified to fix values of property ever since 1945 (Tr. 174-178). As such, of course, the charge was not seriously taken, nor was it pursued by the appellants at any of the court hearings.

Since there is no direct evidence of bad faith, appellants are relegated to the difference in valuations as constituting *per se* malice, although they have not alleged even that for 1949 (Tr. 21). But even from this view, appellants have not carried the burden of proof, for appellee adduced the evidence of the engineer Toner (Tr. 173 *et seq*) based on his examination of the property shortly after the Board of Equalization fixed the value—Toner's valuation was even higher than the City's. The trial court on the first trial found appellant's evidence insufficient to sustain its burden of proof (Tr. 41) of bad faith.

6. Allowance of Costs Is Discretionary with the Trial Court, the Trial Court Has Exercised Its Decision, There Is No Claim that There Has Been an Abuse of Discretion.

This is the principal part of appellants' sixth proposition.

Counsel's position here seems to us to be somewhat confused. He advances, wholly without citation, the